No. 91-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF PUBLIC CITIZEN

This brief is filed, with the written consent of the parties, on behalf of Public Citizen, a non-profit public interest organization with a membership of over 140,000 consumers. Public Citizen is committed to protecting consumers from dangerous products and fraudulent and unfair trade practices. An effective tort system that compensates victims and punishes wrongdoers is an essential means to that end. Within the tort system, punitive damages play a central role in deterring manufacturers of products and providers of services from deliberately or recklessly engaging in behavior that harms consumers.

A central issue in this case is whether substantive due process limits the amount of punitive damages that may be awarded in any given case. On this point, petitioner has argued that punitive damages must bear a "reasonable relationship" to compensatory damages, measured according to an unspecified "range of appropriate multipliers." Numerous *amici* have also urged the Court to limit punitive damages to some specific multiple of compensatory damages (*e.g.*, three-to-one or four-to-one).

Public Citizen submits this brief to explain that any decision that compels the states to establish fixed ratios for punitive damages would harm consumers and undermine important state interests.

SUMMARY OF ARGUMENT

Requiring a proportional relationship between compensatory and punitive damages would harm consumers by undercutting legitimate state goals of deterrence and retribution. Regarding the former, punitive damages deter misconduct that, although arguably rational from the perspective of the individual wrongdoer, has serious social costs. This deterrent function is especially important in cases involving consumers, where total compensatory damages are often small in relation to total anticipated profit from a course of wrongdoing. In such cases, limiting punitive damages to some fixed multiple of compensatory awards would weaken deterrence by permitting wrongdoers to profit from their misdeeds or calculate in advance the cost of their misconduct.

Punitive damages also perform a retributive function by punishing especially egregious and socially undesirable behavior. Limiting punitive damages in any given case to a set multiple of compensatory damages would frustrate this goal in two ways. First, in circumstances where only a few members of a class of victims are able to sue and recover damages from a particular wrongdoer,

compensatory damages (or any small multiple thereof) will not reflect the wrong inflicted on society as a whole. Second, in cases where a defendant behaves especially maliciously, but fortuitously causes only minor injuries, a proportionality rule would prevent the punishment from fitting the crime.

For these reasons, injecting a proportionality requirement into the Due Process Clause of the Fourteenth Amendment would drastically weaken the protections for consumers afforded by the tort system. Consistent with established principles of substantive due process, only punitive awards that bear no rational relation to deterrence and retribution could conceivably be said to overstep constitutional boundaries.

ARGUMENT

LIMITING PUNITIVE DAMAGES TO SOME MULTIPLE OF COMPENSATORY DAMAGES WOULD HARM CONSUMERS BY UNDERMINING DETERRENCE AND RETRIBUTION IN CERTAIN CASES.

At the outset, we note that this Court has never invalidated a punitive damage award on substantive due process grounds. For purposes of this brief, however, we assume that the due process clause of the Fourteenth Amendment places some substantive limits on punitive damage awards distinct from the procedural protections announced by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991) ("*Haslip*").

Petitioner argues that this Court should apply standards of "fundamental fairness" to determine whether the punitive award against it violates substantive due process. The fundamental fairness determination, in

petitioner's view, should include an inquiry into the relationship between compensatory damages and the amount of the punitive award. Taking its cue from *Haslip*, where this Court suggested that a punitive award of four times compensatory damages might be "close to the line," 111 S. Ct. at 1046, petitioner argues that the punitive damages award in this case, which was more than 500 times the compensatory award, cannot withstand constitutional scrutiny.

This brief explains why the substantive component of the due process clause, whatever its contours, cannot reasonably be said to require a fixed proportional relationship of any sort between compensatory and punitive damages. This Court has repeatedly recognized that deterrence and retribution are legitimate state goals sought to be advanced by imposition of punitive damages. *See Haslip*, 111 S. Ct. at 1044, 1059, 1064; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989); *Memphis v. Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974). Yet, as explained below, imposing a fixed ratio on punitive damage awards would actually work *against* deterrence and retribution in many cases, especially those involving consumers. There is no basis in law or logic for imposing a substantive due process standard that would substantially undercut states' ability to deter and punish deliberate or grossly reckless behavior that is particularly harmful to consumers.

1. Deterrence. To explain why a strict proportionality rule would undermine the deterrent effect of punitive damages in consumer cases, we begin by adopting *arguendo* petitioner's claim that, "[i]f every tort were detected and penalized, no punitive award would be necessary to further the State's deterrence goal." Pet. Brief at 28-29. Here, the theory is that a perfectly functioning tort system, in which all victims sue and

recover full compensatory damages, would eliminate misconduct on its own, thereby rendering punitive damages unnecessary.

As petitioner itself recognizes, however, our tort system is highly imperfect, in that many victims are not able to sue and recover damages. That being the case, wrongdoers are often in a position to profit from their misdeeds — unless, of course, they are required to pay damages that reflect not only the harm inflicted on victims who litigate and prevail, but also the harm incurred by non-litigating victims who, for lack of resources or knowledge, or for other reasons, do not pursue their valid claims. This is where punitive damages come into play, by deterring misconduct that might otherwise yield a profit at society's expense.

Limiting punitive awards to a set multiple of compensatory damages would undermine this deterrent function in a number of ways. Take an example where only one in 20 victims is able to sue and prevail against a particular defendant. If compensatory damages in that one case were large in relation to the total anticipated profit from harming the entire class of victims, a small multiplier might be sufficient to permit optimal deterrence. However, if the one litigating victim were to receive a small compensatory award relative to total profit, a large multiplier would be necessary. Thus, imposing a set ratio as a ceiling on *all* punitive damage awards would create non-optimal results (*i.e.*, underdeterrence) in cases where total compensatory damages are small in relation to total anticipated profit.[1]

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[1] To prevent over-deterrence from multiple punitive damage awards, reviewing courts may properly consider "the financial condition of the defendant" and "the existence of other civil awards against the defendant for the same conduct . . . ." *Haslip*, 111 S. Ct.

(continued...)

This proposition has important implications in the context of torts affecting consumers, where large punitive awards are often essential to achieve optimal deterrence. The first reason is that consumer cases often involve situations where the harm to any particular victim is slight, but there exists a risk that the wrongdoer will inflict that slight harm on a wide number of others. Given that few individuals are likely to pursue redress under these circumstances, effective deterrence requires that wrongdoers face the possibility of being assessed punitive awards substantially in excess of actual damages in those few cases where victims do sue and prevail. *See* Vargo, *Prod. Liab. Pract. Guide* § 18.02[4] (Matthew Bender 1993) (forthcoming) ("[p]unitive damages are particularly useful in situations where large numbers of individuals have been slightly or moderately injured by a defective product"); *Wangen*, 294 N.W.2d at 452 (noting that punitive damages may be necessary to encourage bringing of claims in product liability cases where injuries are moderate or minor).

A prime example outside the product liability context is insurance bad faith tort actions, where compensatory damages alone are often not of sufficient magnitude to make it economically feasible for a lawyer to pursue a case. As a result, punitive damages are often the only real deterrent to malicious and oppressive conduct by insurance adjusters. *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) (upholding punitive damage award of 500 times compensatory damages in case involving wrongful denial of insurance claim); *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz.) (upholding punitive

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[1](...continued)
at 1045. *See also Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 459-60 (Wis. 1980); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1319 (1976).

damage award of 233 times compensatory damages where, for over 18 years, insurance company taught adjusters to cheat by "chiseling" small amounts on claims because policyholders would probably not object), *cert. denied*, 484 U.S. 874 (1987).

In addition, as petitioner correctly observes (Pet. Br. at 29-30), consumer fraud often goes undetected by its victims, thereby further limiting the number of lawsuits faced by any given defendant. In such cases, where the compensatory award is often limited to the contract measure of damages, a particularly large punitive award — one that reflects the profit from inflicting harm on non-litigating victims — is essential to deter further misconduct. *See, e.g., Boise Dodge v. Clark*, 453 P.2d 551 (Idaho 1969) (upholding punitive award of 36 times compensatory award in odometer rollback case on grounds that few purchasers would discover the illegal conduct). *See generally FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 623 (7th Cir. 1989) ("[t]he most straightforward rationale for punitive damages . . . is that they are necessary to deter torts or crimes that are concealable"), *cert. denied*, 494 U.S. 1056 (1990); *Walker v. Sheldon*, 179 N.E.2d 497 (N.Y. 1961).[2]

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[2] In *Walker*, the New York Court of Appeals observed:

> Those who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the

(continued...)

There is another way in which a proportionality rule would harm consumers, even in cases where many or most victims are likely to sue and recover full damages. In the foregoing discussion, we assumed the validity of petitioner's assertion that a perfectly functioning tort system would eliminate the need for punitive damages. The flaw in this theory is that it erroneously assumes that a would-be wrongdoer faced with a tort system that guarantees full recovery to all victims would lack any incentive for wrongdoing. One can easily envision a situation, however, where a manufacturer of a product that is known to cause serious injuries to one out of every, say, 1,000 users determines that the benefits of selling the product outstrip the costs, even assuming full recovery by all victims.

A classic example is the Ford Pinto case, where senior management made the decision to go forward with production of the Pinto in the face of evidence that the design of the fuel-integrity system would expose consumers to serious injury or death. This decision was based on a "cost-benefit analysis" that balanced egregiously undervalued "human lives and limbs against corporate profits." *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 812 (Cal. Dist. Ct. App. 1981); *see also Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn. 1980) (punitive damages awarded where manufacturer of flammable pajamas continued to market its product, despite knowledge that there "were economically feasible measures which could have been taken to reduce this danger to a fairly acceptable level"); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (punitive damages

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[2](...continued)
additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.
179 N.E.2d at 499.

awarded where manufacturer continued to distribute television sets known to burst into flames, and to assure customers that they were safe), *cert. denied*, 424 U.S. 913 (1976).[3]

In such cases, punitive damages perform the essential function of deterring reprehensible conduct that, although arguably rational from the standpoint of the particular tortfeasor, has devastating social costs for consumers and for society. Restricting punitive awards to some multiple of compensatory damages would limit this deterrent effect by allowing businesses to factor punitive damages into the cost-benefit equation. As two commentators have observed:

> Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and their resulting limited compensatory damages. They must know that their financial existence may be threatened by the evil they contemplate.

Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest*, 18 St. Mary's L. J. 797, 833 (1987). *See also Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 47 (Alaska 1979) (the threat of multiple punitive damages "forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective . . . or an untested product"). *Cf. Wangen*, 294 N.W.2d at 451 ("[t]he possibility of the manufacturer paying out more than compensatory damages might very well deter those who would consciously engage in wrongful practices and who would

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[3] For an extensive compilation of cases fitting this mold, *see* Vargo, *Prod. Liab. Pract. Guide* § 18.01 (Matthew Bender 1993) (forthcoming).

set aside a certain amount of money to compensate the injured consumer").

The foregoing demonstrates the importance of preserving a flexible approach to punitive awards, especially in consumer cases. As petitioner itself admits, there is no single "rational deterrence-based punitive damage multiplier." Pet. Br. at 30. Rather, for deterrence purposes, the optimal punitive award in any given case will vary according to a number of factors, including the extent to which the injury is concealable, the likelihood that victims will seek redress, and the likely extent of the victims' injuries. Moreover, as explained above, it is essential that potential tortfeasors not be able to calculate in advance the costs of their misdeeds. Thus, as this Court recognized in *Haslip*, states have a legitimate interest in "meaningful *individualized* assessment[s] of appropriate deterrence and retribution." 111 S. Ct. at 1044 (emphasis added). Limiting punitive damages to some set multiple of compensatory damages would impermissibly interfere with this important interest, to the clear detriment of consumers.

2. Retribution. A strict proportionality requirement would also frustrate the retributive function of punitive damages. On this point, petitioner argues that "the 'just desert' rationale of retributive justice inherently limits a retributive penalty to an amount proportional to the wrong inflicted." Pet. Br. at 26. The flaw in this reasoning is that compensatory damages, which petitioner seeks to establish as the touchstone for all punitive awards, often do not reflect the full extent of either "the wrong inflicted" or the reprehensibility of the offense.

Here, again, the consumer example is illustrative. As explained above, there are often special factors at work that inhibit victims in consumer cases from suing and recovering damages against a particular tortfeasor. Assume that only one in 20 such victims sues and prevails.

If punitive damages in that one case were limited to some small multiple of the compensatory award against that single victim, the punitive award would in no way account for "the wrong inflicted" on the majority of the *other* victims, who failed to obtain redress. For this reason, limiting punitive damages to some small multiple of compensatory damages would not ensure that the punishment reflects the gravity of the offense.

A proportionality requirement would also undercut the retributive function of punitive damages in cases where a defendant causes only minor injuries, but acts with ill will or malice requiring substantial punishment, or where a defendant engages in heinous conduct with an enormous potential for harm, but which fortuitously results in little actual harm. In such cases, to use a multiple of compensatory damages is plainly irrational.[4] Petitioner's error, then, stems both from artificially limiting "the wrong inflicted" to the damages suffered by a victim in a single case (an especially unrealistic approach in consumer cases) and from erroneously assuming that compensatory damages provide an appropriate measure of the need for punishment even within the context of a single suit.

Thus, as with deterrence, optimal retribution demands an individualized punitive damage system not bound by mathematical equations. As one court has aptly observed:

> The admonitory function of punitive damages does not lend itself to formulation. . . . The refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to beha-

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[4] As noted by the West Virginia Supreme Court, in cases "in which the potential for harm from the defendant's conduct was tremendous, but the actual compensatory damages were negligible, punitive damages in a ratio much greater than five to one were entirely appropriate." JA 889.

> vior, not to results, to determine the need to admonish . . ..

Campus Sweater & Sportswear v. M.B. Kahn Construction Co., 515 F. Supp. 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981). This Court, too, should recognize that a formulaic approach to punitive awards would work against legitimate retributive goals and could have disastrous consequences for consumers.

This is not to say that substantive due process is necessarily without force in the context of punitive damage awards. It may be, for example, that a punitive award that clearly exceeds any amount needed to further deterrence or retribution crosses the constitutional line. Such an approach — unlike that urged by petitioners — would accord with traditional notions of substantive due process by ensuring that punitive damages in any given case bear some rational relation to legitimate state interests. *See Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955); *see also Haslip*, 111 S. Ct. at 1045 (punitive awards should be "rational in light of their purpose to punish what has occurred and to deter its repetition"). Adopting a strict proportionality requirement, in contrast, would introduce an element of irrationality into the system by imposing an artificial limit on punitive damage awards that is entirely unrelated to — and often works against — state goals of deterrence and retribution, especially in cases affecting consumers.

CONCLUSION

For the foregoing reasons, the Court should reject the suggestion that substantive due process compels states to establish fixed ratios for punitive damages and affirm the judgment below.

Respectfully submitted,

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